Supreme Court, U.S.
FILED
FEB 17 2005
OFFICE OF THE CLERK

(11)

No. 04-70

IN THE

Supreme Court of the United States

EXXON CORPORATION,

Petitioner,

v.

ALLAPATTAH SERVICES, INC., *et al.*,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

REPLY BRIEF

CARTER G. PHILLIPS*
VIRGINIA A. SEITZ
ROBERT N. HOCHMAN
SIDLEY AUSTIN BROWN & WOOD LLP
1501 K Street, N.W.
Washington, D.C. 20005
(202) 736-8000

Counsel for Petitioner

February 17, 2005

* Counsel of Record

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20001

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INTRODUCTION AND SUMMARY OF ARGUMENT

For nearly 200 years, the interpretation of 28 U.S.C. § 1332 announced in *Strawbridge* v. *Curtiss*, 7 U.S. (3 Cranch) 267 (1806), has governed the scope of a federal court's diversity jurisdiction: A federal court lacks jurisdiction over a civil action based on state law unless all plaintiffs are of diverse citizenship from all defendants. For more than 30 years, the interpretation of § 1332 announced in *Zahn* v. *International Paper Co.*, 414 U.S. 291 (1973), has governed the scope of a federal court's diversity jurisdiction: A federal court lacks jurisdiction over a class action based on state law unless each class member's claim exceeds the jurisdictional minimum prescribed in § 1332. Congress has never amended the diversity-jurisdiction statute in any way that calls either interpretation of § 1332 into doubt. See *Owen Equip. & Erection Co.* v. *Kroger*, 437 U.S. 365, 373-74 (1978).

Respondents and the Government, however, read 28 U.S.C. § 1367 to reverse both *Strawbridge* and *Zahn*. If Congress had intended to overturn rules rooted in precedent nearly as old as diversity jurisdiction itself – rules that protect the federal courts from an increasing volume of state-law cases and that respect state sovereignty in the development and application of state law – it would have debated those issues at length. And, Congress would have spoken clearly to the issue, in the statutory text of § 1367 or § 1332, or in the legislative history. But Congress took none of these actions because it did not intend to make any fundamental change. A federal court sitting in diversity lacks "original jurisdiction" over a "civil action" where plaintiffs or class members do not satisfy the requirements of § 1332, and thus § 1367 does not authorize federal district courts to exercise supplemental jurisdiction in that setting.

In fact, Congress enacted § 1367 to overturn *Finley* v. *United States*, 490 U.S. 545 (1989). Rejecting substantial

contrary authority in lower federal courts, *Finley* had held that federal courts lacked pendent-party jurisdiction in federal-question cases and indicated that all extensions of pendent and ancillary jurisdiction should receive express congressional authorization. *Id.* at 546-47, 556. Section 1367 packaged pendent and ancillary jurisdiction under the rubric supplemental jurisdiction, and restored the law to its pre-*Finley* state. Respondents' effort to wrest a jurisdictional revolution out of a congressional effort to prevent a (different) jurisdictional revolution is ironic and incongruous.

This case presents the Court with a clear choice. If Exxon is correct, § 1367 provides the statutory foundation for the exercise of supplemental jurisdiction without expanding federal-diversity jurisdiction. If respondents are correct, § 1367 amends § 1332 through the backdoor in class and other multi-party cases in a manner that gives rise to nonsensical results. Members of Congress were expressly told by the authors of the House Report on the legislation that they were not altering the jurisdictional requirements of § 1332 and that the legislation was "noncontroversial," and "relatively modest." H.R. Rep. No. 101-734, at 28-29 & n.17, 15 (1990) ("House Report"). Nothing in the text of § 1367 would give a Member cause to doubt those representations. The best reading of § 1367 and the clear meaning conveyed in its legislative history fit comfortably within the legal framework that has long governed diversity jurisdiction. This Court should adopt that reading.

Finally, respondents claim that this Court lacks the authority to vacate the judgment and remand for reconsideration if this Court reverses the Eleventh Circuit's broad reading of § 1367, primarily on the ground that the validity of the judgment is not within the question presented. This cannot be correct; the proper disposition of this case following a decision that the court below lacked jurisdiction is necessarily within the question presented. Clearly, a reversal of the Eleventh Circuit would necessarily raise

questions related to the consequences of the district court's lack of jurisdiction – the definition of an appropriate class, the propriety of certification of that class, and the impact of the jurisdictional ruling on the judgment. If the district court certified a class and tried a class action over which it lacked jurisdiction, its judgment cannot stand, and the effect of the loss of jurisdiction on the case plainly must be examined.

ARGUMENT

I. FEDERAL COURTS LACK JURISDICTION OVER DIVERSITY-BASED CLASS ACTIONS IF SOME CLASS MEMBERS' CLAIMS DO NOT SATISFY THE JURISDICTIONAL AMOUNT.

The text of § 1367(a) makes clear that before a court can exercise supplemental jurisdiction over a claim, the court must have "original jurisdiction" over the "civil action." Respondents, purporting to rely upon the "plain language" of § 1367(a), *rewrite* it as follows:

> This subsection thus provides a broad grant of jurisdiction over any claim which forms part of the same case or controversy as a *claim* within the court's original jurisdiction. [Resp. Br. 18 (emphasis supplied).]

Respondents thus read § 1367(a) to say that if a court has original jurisdiction over *any* claim in a complaint, the court may exercise supplemental jurisdiction over *all other* claims that are part of the same case or controversy. That is not what § 1367(a) says.

The fundamental error pervading the analysis of respondents and the Government is their refusal to accept the implications of Congress's decision that in order to exercise supplemental jurisdiction, a district court must first have "original jurisdiction" over the entire "civil action," not just

over a single claim, analyzed in isolation, within the action.[1] The "civil action" language of § 1367(a) is critical here for two distinct reasons: (1) because this is a class action, and (2) because federal jurisdiction is asserted under the diversity statute only, and not the federal-question statute.

1. *A class action is its own civil action.* As Exxon explained in its opening brief, a class action is fundamentally different from individual and multi-party actions. A class-action complaint includes class allegations, is immediately treated as a class action unless and until the court denies certification, and immediately imposes special obligations on class counsel. Pet. Br. 17. The named plaintiff is a representative of the absent class members based on the legal and factual relationship between his or her claim and the claims of absent class members, and that relationship warrants binding unnamed class members to the outcome of the named plaintiff's litigation. *Amchem Prods., Inc.* v. *Windsor*, 521 U.S. 591, 623 (1997). The district court must certify or deny certification of the class at the earliest practicable moment. Fed. R. Civ. P. 23(c)(1)(A). As the Federal Rules of Civil Procedure and, indeed, the history of representative actions make clear, a class action is not an individual's "civil action" to which numerous other claims are later joined. Instead, a class action is a fundamentally different kind of aggregation, and class certification is qualitatively different from joinder or intervention.

Respondents seek to evade this point, and the necessary consequence that if a class includes members who do not satisfy the jurisdictional-amount requirement, the district court lacks original jurisdiction over the "civil action." Instead, they mischaracterize Exxon's brief as an argument

[1] In federal-question cases, a district court obtains jurisdiction over the "civil action" by virtue of the presence of a single federal claim. But the same analysis does not apply to diversity jurisdiction. *Infra* at 9-11.

that § 1367(a) does not authorize supplemental jurisdiction in class actions because § 1367(a) "does not specifically reference Rule 23," and dismiss this straw man as "peculiar." Resp. Br. 25. But, in interpreting § 1367(a) to authorize supplemental jurisdiction over unnamed class members, respondents wrongly assume that a district court with original jurisdiction over a named plaintiff's individual claim would also have jurisdiction over a class action in which the plaintiff is the class representative. These actions, however, are most emphatically not the same "civil action"; a court has original jurisdiction over the former, but not the latter. This response thus fails to speak to the critical point – that there are substantive and procedural differences between class actions and individual or other multi-party actions that make a class action a distinct type of "civil action," and not an individual claim to which other claims can be joined by the mechanism of supplemental jurisdiction. In a class action, the text of § 1367(a) permits supplemental jurisdiction only if the court has "original jurisdiction" over the class action itself; it does not permit the transformation and redefinition of the class itself through the mechanism of supplemental jurisdiction.

The Government tries to fill the gap left by respondents, claiming that the court has original jurisdiction over a class-action complaint at least until the class is certified and absent class members are bound. U.S. Br. 15.[2] It is true that absent class members are not bound until a class is certified, see *Hansberry* v. *Lee*, 311 U.S. 32, 40 (1940). But, the Government's conclusion that a class action is initially the same as an individual action brought by the named plaintiff is wrong. As noted above, the law does *not* ignore class

[2] Even if a class-action complaint were treated as an individual claim before certification (which it is not), and even if § 1367(a) were interpreted to authorize supplemental jurisdiction over other individual claims that do not satisfy § 1332 (which it does not, *see infra* at 12-13), the result would not be a class action, but a multi-party case.

allegations in proceedings on a class-action complaint. For example, class allegations are tested from the outset; courts rule on them first, without consideration of a named plaintiff's substantive claims. See Fed. R. Civ. P. 23(c)(1)(A); *Deposit Guar. Nat'l Bank* v. *Roper*, 445 U.S. 326, 336 (1980) (class certification is collateral to a claim's merits). Limitations on all putative class members' claims are tolled, see *American Pipe & Constr. Co.* v. *Utah*, 414 U.S. 538, 547-49 (1974); and class counsel assumes fiduciary obligations, see *In re General Motors Corp. Pick-Up Truck Fuel Tank Prods. Liab. Litig.*, 55 F.3d 768, 801 (3d Cir. 1995). As experienced class-action litigators know, class action litigation is, from the beginning, fundamentally different from an individual action.

More importantly, in the very context presented here, this Court has already *rejected* the contention that class actions can be treated as individual "civil action[s]" to which massive numbers of claims are joined. This position was urged on the Court in *Zahn*, but was embraced only in the *dissenting* opinion. See 414 U.S. at 305 (Brennan, J., dissenting). Justice Brennan argued that the named plaintiff's individual claim constituted a civil "action" and that principles of ancillary jurisdiction brought the absent class members' claims before the court. This Court, however, refused to find that original jurisdiction over the "action" could be based on the fact that the named plaintiff's claim satisfied the jurisdictional minimum of § 1332. *Id.* at 298-301.

The Court's rejection of the ancillary-jurisdiction argument in *Zahn* severely undermines the Government's argument that § 1367 overrules *Zahn*. Section 1367(a) makes "original jurisdiction" over an "action" a prerequisite for supplemental jurisdiction; and in *Zahn*, this Court refused to find that the district court had original jurisdiction over the "action" even though the named plaintiff's claim satisfied the jurisdictional-amount requirement of § 1332. Indeed, § 1367(a) appears to use the very language necessary to preserve *Zahn*. And,

reading § 1367(a) to preserve *Zahn* is doubly justified; in *Zahn* itself, this Court observed that Congress could amend § 1332, but explained that *Zahn* would stand until "some express statement of [contrary] intention . . . appear[s]." 414 U.S. at 302.

2. *In a diversity case, "original jurisdiction" over a "civil action" requires analysis of each party's claims.* Respondents and the Government claim that a court's original diversity jurisdiction is not destroyed by the presence of a plaintiff whose claims fail to satisfy the jurisdictional minimum of § 1332. Acceptance of this view would revolutionize diversity jurisdiction, without the slightest indication that Congress intended to do so.

First, reading § 1367(a) to authorize federal courts with diversity jurisdiction over a single plaintiff's claims to exercise supplemental jurisdiction over non-compliant plaintiffs' claims simply cannot be squared with *Strawbridge*. *Strawbridge* included an individual claim over which the district court would have had jurisdiction had it been the sole claim in the action. See 7 U.S. (3 Cranch) at 267 (Massachusetts citizen sued Vermont citizen). But, in *Strawbridge* and since that time, this Court has uniformly held that the presence of a non-diverse defendant "destroys original jurisdiction" over the entire action. *Wisconsin Dep't of Corrs.* v. *Schacht*, 524 U.S. 381, 389 (1998).

Respondents and the Government acknowledge, as they must, the longstanding rule that the absence of complete diversity destroys jurisdiction over the entire action. Resp. Br. 22; U.S. Br. 13. But, they claim, § 1332 creates a hierarchy of jurisdictional elements within which complete diversity is more important than the minimum-amount requirement. Nothing in either the text of § 1332 or § 1367 or in this Court's decisions suggests that one jurisdictional element is of greater importance than another.

Section 1367 speaks simply of "original jurisdiction" over a "civil action"; and § 1332 defines when such original jurisdiction exists in diversity cases. Section 1332 provides that "citizens of different states" is a jurisdictional requirement, and *Strawbridge* interpreted this language to mean complete diversity. Section 1332 also speaks of the "matter in controversy"; in *Snyder* v. *Harris*, 394 U.S. 332, 336-37 (1969), this Court recited the long line of decisions interpreting that phrase to mean that the claims of each party in the case must exceed the jurisdictional amount. Nothing in the statute suggests a jurisdictional pecking order between the two, or that one is more fundamental than the other. Cf. *Ruhrgas AG* v. *Marathon Oil Co.*, 526 U.S. 574, 578, 584-85 (1999). Indeed, this Court has given a strong indication of the importance of the jurisdictional-amount requirement in the class setting by requiring that all putative class members satisfy it. See *Zahn*, 414 U.S. at 300-01. And neither respondents nor the Government offer any policy basis for introducing the potentially pernicious notion of more and less important jurisdictional facts in the diversity setting.

In arguing the jurisdictional-minimum requirement is less important, both the Government and respondents point out that in *Clark* v. *Paul Gray, Inc.*, 306 U.S. 583, 590 (1939), this Court authorized dismissal of a party whose claim failed to meet the jurisdictional minimum in order to allow jurisdiction over the claim of another party who satisfied § 1332. See Resp. Br. 22; U.S. Br. 13-14. But *Clark* cannot bear the weight they place upon it. First, the Court has also authorized dismissal of a non-diverse party in order to allow jurisdiction over litigation among diverse parties, so this case cannot support differential treatment of the diverse-citizenship and minimum-amount requirements. See, *e.g.*, *Schacht*, 524 U.S. at 389; *Newman-Green, Inc.* v. *Alfonzo-Larrain*, 490 U.S. 826 (1989); *Caterpillar, Inc.* v. *Lewis*, 519 U.S. 61 (1996).

In any event, *Clark* supports the conclusion that a district court lacks *original* jurisdiction over an *action* as a whole so long as the non-compliant parties are in a case. It simply explains how to *cure* an acknowledged jurisdictional defect. It makes no sense to say, as respondents effectively do, that if a jurisdictional defect can be *cured*, then original jurisdiction is never lacking. Indeed, as the cases recited in the previous paragraph make clear, deficiencies in both complete diversity and jurisdictional amount can be cured under appropriate circumstances. Yet until that cure is effectuated, the absence of either jurisdictional element destroys jurisdiction over the entire action.

In the alternative, respondents and the Government urge this Court simply to ignore that their interpretation of § 1367(a) would overrule *Strawbridge*, because this case involves jurisdictional amount rather than complete diversity. See Resp. Br. 27; U.S. Br. 22. But, the *logic* of their interpretation would compel this Court to overrule *Strawbridge*; and it would be absurd to interpret § 1367 without recognizing and addressing that consequence of the interpretation proffered by respondents and the Government. Indeed, that consequence makes their interpretation exceedingly unlikely in this setting.

If this Court were to interpret the phrase "civil action of which the district courts have original jurisdiction" in § 1367(a) as respondents propose, it would have to hold that Congress intended to destroy the complete-diversity rule of § 1332 without so much as gesturing toward § 1332 with an eraser. *Strawbridge* means nothing if § 1367 authorizes a court to find a single claim in a diversity action that satisfies § 1332, and then to assert supplemental jurisdiction over non-compliant plaintiffs. *That* is how respondents and the Government read § 1367(a), and that is, accordingly, what is at stake. *Zahn* and *Strawbridge* stand or fall together.

Respondents and the Government inaptly rely on *City of Chicago* v. *International College of Surgeons*, 522 U.S. 156

(1997) – a case involving *federal-question* jurisdiction – to support their broad reading of § 1367(a). Resp. Br. 20; U.S. Br. 11-12. In *City of Chicago*, the Court read § 1367 to codify the longstanding rule that the presence of a federal question in a case provides "original jurisdiction" over the entire "civil action," such that supplemental jurisdiction may be asserted over other claims in the action. 522 U.S. at 164-66. As *City of Chicago* recognized, this rule was in place *before* Congress enacted § 1367 and has always been limited to federal-question cases: "this Court has long adhered to principles of pendent and ancillary jurisdiction by which the federal courts' original jurisdiction *over federal questions* carries with it jurisdiction over state law claims that 'derive from a common nucleus of operative fact.'" *Id.* at 164-65 (emphasis added) (quoting *United Mine Workers of Am.* v. *Gibbs*, 383 U.S. 715, 725 (1966)). Respondents and the Government apparently contend that § 1367(a) cast aside the established limits on the scope of "original jurisdiction" in a "civil action" under § 1332, and applied the broader definition of "original jurisdiction" in a "civil action" used in federal-question cases. Yet they neither identify a textual hook for that interpretation nor explain why Congress would alter decades of law differentiating diversity and federal-question jurisdiction in the *supplemental*-jurisdiction statute.

In fact, for several reasons, Congress has long acquiesced in this Court's delineation of relatively broad supplemental jurisdiction in federal-question cases and substantially narrower supplemental jurisdiction in diversity cases. There is a particularly strong federal interest in federal-court resolution of federal questions to promote uniformity in the interpretation and application of federal law through the federal appellate process. *Martin* v. *Hunter's Lessee*, 14 U.S. (1 Wheat.) 304, 347-48 (1816) (Story, J.). Further, traditionally, there has been a concern that state courts would prove hostile to federal claims. See *Merrell Dow Pharms., Inc.* v. *Thompson*, 478 U.S. 804, 827 n.6 (1986) (Brennan, J., dissenting) (describing Congress's historical understanding that federal courts are more sympathetic to federal rights than state courts). Neither of these concerns is present when federal courts adjudicate state-law claims in diversity actions. Indeed, it has been questioned whether there is a continuing need for diversity jurisdiction. See, *e.g.*, Fed. Courts Study Comm., 101st Cong., *Report of the Federal Courts Study Committee* 38-45 (Comm. Print 1990) ("Study Committee Report").

Moreover, the supplemental-jurisdiction statute was enacted in response to a perceived threat to federal-question jurisdiction. Congress acted only after *Finley* altered the rules of pendent jurisdiction in a way that threatened severely to limit federal-court adjudication of federal claims, and Congress sought only to restore and codify the rules as they existed *before Finley*. Specifically, after *Finley* rejected pendent-party jurisdiction in federal-question cases and appeared to require statutory authorization for any pendent or ancillary jurisdiction, Congress was concerned that a plaintiff with federal and state claims against different defendants would be forced to litigate federal claims in state court in order to bring all claims in a single forum. Section 1367(a) restored the federal forum for adjudication of federal claims brought in conjunction with state claims against multiple parties. Nothing in this context or in 1367(a)'s text suggests a congressional intent dramatically to alter the scope of § 1332.

An ambiguous statutory term should be interpreted in a way "which fits most logically and comfortably within the body of . . . previously . . . enacted law." *West Virginia Univ. Hosps., Inc.* v. *Casey*, 499 U.S. 83, 100 (1991), *superseded by statute on other grounds, Landgraf* v. *USI Film Prods.*, 511 U.S. 244 (1994). The phrase "civil action of which the district courts have original jurisdiction" in § 1367(a) incorporates another federal statute, § 1332, that has an established interpretation based on numerous decisions of this

Court. Only Exxon's interpretation of § 1367(a) fits logically with § 1332 and its established interpretation.

3. *Section 1367(b) does not support a broad reading of "civil action" in § 1367(a).* Viewed in its legal and historical context, § 1367(a) does not authorize supplemental jurisdiction over the class action in this case. With their "plain meaning" argument eliminated, respondents and the Government are left with the argument that § 1367(b) lacks content if Exxon's interpretation is correct. Resp. Br. 20; U.S. Br. 20. They contend that under Exxon's interpretation of § 1367(a), the federal courts never have supplemental jurisdiction over *any* claim in a diversity case. "In fact," says the Government, "Congress could have dispensed with subsection (b) altogether." U.S. Br. 20.

This is clearly wrong. Exxon's reading of § 1367 does not eliminate supplemental jurisdiction in diversity cases; it simply leaves in place the rules that limit diversity-based supplemental jurisdiction to cases which do not undermine the fundamental premises of *Strawbridge* and *Zahn*. Evasions of the complete-diversity rule and the minimum-amount requirement are not allowed. But, § 1367(a) authorizes supplemental jurisdiction in diversity cases over "claims by a defending party haled into court against his will, or by another person whose rights might be irretrievably lost unless he could assert them in an ongoing action in a federal court," even where there is no independent basis of jurisdiction for the new claim. See *Owen Equip.*, 437 U.S. at 376.

For example, § 1367 allows supplemental jurisdiction over a compulsory counterclaim by a defendant in a diversity case, even if the amount-in-controversy in that claim is less than § 1332's jurisdictional minimum. "Original jurisdiction" over the "civil action" is not destroyed by the defendant's assertion of a compulsory counterclaim, and § 1367(b) does not deprive the court of the jurisdiction granted in § 1367(a).

Section 1367 is not a model of efficient draftsmanship. Both parties' readings of § 1367 render some portion of the statute superfluous. Under Exxon's interpretation, certain provisions in § 1367(b) simply underscore the absence of supplemental jurisdiction that already follows from its reading of § 1367(a) alone (*e.g.*, § 1367(b)'s denial of supplemental jurisdiction for plaintiffs' claims against persons made parties under Rule 20). And under respondents' and the Government's reading of the first sentence of § 1367(a), there was no need to add the second sentence which specifies that "[s]uch supplemental jurisdiction shall include claims that involve the joinder or intervention of additional parties." Of course, all parties find explanations of emphasis or clarification for their own redundancies; but the reality is that *no* construction of § 1367 makes sense of every word.

Instead, this Court should adopt the construction of § 1367 that makes the most sense of the statute's terms in light of its text and purposes in the legal and historical context in which it was adopted. See *West Virginia Univ. Hosps.*, 499 U.S. at 101 (the Court's "role [is] to make sense, rather than nonsense out of the *corpus juri*"); *In re Chapman*, 166 U.S. 661, 667 (1897). Exxon's interpretation is based on a straightforward congressional purpose to restore the pre-*Finley* law of ancillary and pendent jurisdiction.[3]

Respondents and the Government, in contrast, offer no principle or set of principles that might have led Congress to the supplemental-jurisdiction scheme they urge the Court to adopt. On their reading, the complete-diversity rule bars an Illinois plaintiff from asserting state-law claims in federal

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[3] As noted in Exxon's opening brief, § 1367 modified the then-prevailing view of ancillary jurisdiction in *one* respect: Congress chose *not* to allow supplemental jurisdiction in diversity cases over the claims of parties entitled to intervene under Rule 24(a). *See* Pet. Br. 26.

court against both an Indiana and an Illinois citizen, but allows an Illinois and an Indiana citizen jointly to assert state-law claims in federal court against an Illinois citizen. Moreover, respondents and the Government say that § 1367 authorizes supplemental jurisdiction over state-law claims that do not satisfy § 1332 if the plaintiffs are brought into a case under the *permissive* joinder provisions of Federal Rules of Civil Procedure 20 and 23 (even though the claims do not satisfy § 1332), but denies supplemental jurisdiction over the claims of non-compliant plaintiffs whose presence is *necessary* for just adjudication. Courts must sometimes enforce incoherent legislative schemes mandated by statutory text; but here, § 1367's text supports a sensible interpretation that comports with Congress's purpose. *Bank One Chi., N.A.* v. *Midwest Bank & Trust Co.*, 516 U.S. 264, 275 (1996) (rejecting statutory interpretation that "yield[s] an incoherent jurisdictional scheme").

4. *The legislative history fully supports Exxon's interpretation of § 1367.* The legislative history of § 1367 provides substantial support for the interpretation already mandated by its text, structure and legal context. Specifically, the House Report expressly confirms Exxon's interpretation.

In that Report, the Congress that enacted § 1367 was informed that it concerned only *supplemental* jurisdiction, and would not alter the underlying rules concerning original jurisdiction in diversity cases. See House Report at 29 & n. 17 (§ 1367 "is not intended to affect the jurisdictional requirements of . . . § 1332" and expressly preserves *Zahn*'s interpretation of § 1332). This makes sense because Congress would not have fundamentally altered § 1332 through the round-about mechanism of a supplemental-jurisdiction statute. See also *id.* at 15, 28 (legislation is "noncontroversial" and "relatively modest"). In any event, the Report is explicit confirmation for the better reading of § 1367's language and structure.

Respondents ask this Court to disregard the clear statements of congressional intent, by claiming that they are essentially fraudulent. Resp. Br. 37 (accusing authors of *Zahn* statement in House Report of "hijack[ing]" legislation that overruled *Zahn*).[4] The accusation is overwrought and beside the point. It is overwrought because it treats one law professor's accusation against other professors as an admission of impropriety by the others, who were participants in the work of the Federal Courts Study Committee ("FCSC") and were thus involved in the legislative process that produced § 1367. See Rowe, Burbank & Mengler, *Compounding or Creating Confusion About Supplemental Jurisdiction? A Reply to Professor Freer*, 40 Emory L.J. 943, 950, 960 n.90 (1991). But, FCSC participants have never said that the legislative history and the text cannot be squared; they only feared that a court "may" see it that way. *Id.* at 950.[5]

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[4] The Government urges the Court to disregard the statements solely on the ground that they cannot be squared with § 1367's plain language. U.S. Br. 27-28. This is effectively a concession that if § 1367 can reasonably be read as Exxon suggests, this clear legislative history strongly supports Exxon's reading of § 1367. *See Toibb* v. *Radloff*, 501 U.S. 157, 162 (1991) ("a court appropriately may refer to a statute's legislative history to resolve statutory ambiguity").

[5] A review of the drafting history of § 1367 supports the House Report's endorsement of *Zahn* and *Strawbridge*. As detailed in the Brief of Respondent in this case's companion, a FCSC subcommittee originally proposed to abolish *Zahn*, but the full FCSC rejected that view in favor of generally *narrowing*, not expanding, diversity jurisdiction. The FCSC Chair submitted a statement to the House Subcommittee on Courts that was drafting supplemental-jurisdiction legislation and objected to an early draft because it would undermine *Strawbridge* and *Owen*, expanding diversity jurisdiction. The Chair then proposed statutory language that he thought would fulfill the FCSC goal of preserving settled limits on diversity jurisdiction. The final version of the bill including § 1367, is even narrower than that proposed by the FCSC Chair. *See* Br. for Resp. at 38-40, *Ortega* v. *Star-Kist Foods, Inc.*, No. 04-79 (U.S. filed Jan. 18, 2005).

Even more important, the accusation is beside the point. Legislative history is valuable as an interpretive aid to the extent it illuminates congressional intent. The members of Congress who looked to the House Report to assess the legislation they were voting for (or against) would have learned that it was intended to preserve *Zahn*, and enacted § 1367 on this understanding without regard to the process that led to its inclusion. See *Eldred* v. *Ashcroft*, 537 U.S. 186, 209 n.16 (2003) ("'[i]n surveying legislative history, we have repeatedly stated that the authoritative source for finding the Legislature's intent lies in the Committee Reports on the bill'") (quoting *Garcia* v. *United States*, 469 U.S. 70, 76 (1984)). Thus, the House Report confirms what common sense suggests: Congress did not intend to amend the longstanding limitations on § 1332 established in *Strawbridge* and *Zahn* when they enacted § 1367.

II. THE JUDGMENT SHOULD BE VACATED BECAUSE THE COURT LACKED JURISDICTION OVER THE ACTION.

If this Court concludes that the district court lacked jurisdiction over this class action, it must determine the proper disposition of the case. Respondents wrongly assert that the question presented determines the proper disposition – excision from the class of those members whose claims do not satisfy the jurisdictional minimum. Resp. Br. 42-43.

The question presented does not assume that the district court had jurisdiction over this civil action. To the contrary, it asks the Court to find that the district court lacked such jurisdiction. The question presented simply accepts that *if* the "individual claims" of the named plaintiffs had not been aggregated with the claims of noncompliant class members through the class-certification mechanism, the district court would have had "original jurisdiction" over those "claims." The question presented, however, makes *no* assumption about the consequences that follow if the district court lacked

original diversity jurisdiction over a class action that included non-compliant members. And, if this Court concludes that the district court lacked such jurisdiction, the proper disposition of this case is not only "fairly included" in the question presented, Sup. Ct. R. 14.1(a), it is necessarily before this Court. Indeed, even respondents acknowledge that one analytical question facing the Court is whether the inclusion of non-compliant parties destroys the district court's original jurisdiction, see Resp. Br. 22, an admission that necessarily means that the consequences of the absence of such jurisdiction must be addressed by this Court or by another court on remand.

It is equally clear that if the district court never had "original jurisdiction" over this "civil action," it was without power to act, much less enter a valid judgment. *American Fire & Cas. Co.* v. *Finn*, 341 U.S. 6, 16-19 (1951); *Steel Co.* v. *Citizens for a Better Env't*, 523 U.S. 83, 94-95 (1998). And, the only reason this Court would not simply vacate the judgment would be if this Court were to determine, as in *Newman-Green*, that the jurisdictional defect could be cured through an "[a]ppellate-level amendment[]." 490 U.S. at 836. But, for several reasons, this is not such a case.

First, the usual appellate-level amendment is to drop the parties that destroy the court's diversity jurisdiction. That was the path taken by this Court in *Clark*. But, because this is a *class* case, that path is not available. Where, as in *Clark*, a party is joined in litigation through Federal Rule of Civil Procedure 20, the dismissal of that party does not inherently undermine the course of proceedings and prior court rulings. That is not true in a class action. In order to alter the scope of a certified class, the court must define and certify an entirely new class. The Rule 23 inquiry is complex and fact specific, and district courts have broad discretion over whether to certify a class. See *Reiter* v. *Sonotone Corp.*, 442 U.S. 330, 345 (1979). In addition, the scope and nature of a class certification fundamentally alters the dynamics of litigation,

as this Court has recognized. See Pet. Br. 41-46. This Court has instructed that appellate-level amendments to cure jurisdictional defects should be used "sparingly," and the class-action context warrants particularly careful treatment.

More specifically, clearly, in this case, "the presence of [a] nondiverse party produced a tactical advantage" for plaintiffs to the substantial prejudice of Exxon, for reasons set forth in the opening brief. *Newman-Green*, 490 U.S. at 838. In addition, respondents fail adequately to consider the practical consequences of the jurisdictional holding. Assume that the district court had recognized that it lacked jurisdiction to decide the claims of thousands of Exxon dealers who do not satisfy the minimum-amount requirement. At that point, the district court considering whether to certify the federal class would have been confronted with the fact that dismissed dealers would have to bring their claims in smaller state-court class actions in several states, that the state-court class actions would proceed at the same time as the federal class action and would duplicate the federal action; and that the state courts would have the final word on the interpretation and application of state law to the claims at issue.

In this setting, there is a serious question whether the district court would have considered a federal class action "superior" to other methods of adjudicating these claims (to wit, the state-court classes that even the larger dealers would be free to join). One purpose of Rule 23 is to avoid the unnecessary duplication of actions. *Walters* v. *Reno*, 145 F.3d 1032, 1047 (9th Cir. 1998). And, manageability issues would be raised if a federal class action were running parallel with state class actions. *Amchem Prods.*, 521 U.S. at 620 (district court must consider manageability when certifying a litigation class). The district court in *Zahn* itself perceived that a change in the composition of the class affects the propriety of class certification. *Zahn* v. *International Paper Co.*, 53 F.R.D. 430, 433-34 (1973), *aff'd*, 496 F.2d 1033 (2d Cir. 1972), *aff'd*, 414 U.S. 291 (1973). The same inquiry

should have taken place here, but did not, to Exxon's prejudice.

Further reason to vacate the judgment in this case arises out of the powerful precedent this Court's disposition will set for future class cases involving class members whose claims destroy jurisdiction. If a district court can certify a class over which it lacks jurisdiction and postpone the determination of whose presence destroys jurisdiction, serious procedural problems ensue. Can such a class action be validly settled? A court order approving a settlement is required in class cases. Fed. R. Civ. P. 23(e). That order, like any order, would be void if entered without jurisdiction. *Costello* v. *United States*, 365 U.S. 265, 285 (1961). The same jurisdictional defect would constrain a settling party's ability to enforce a settlement agreement against the putative class members. See *Ticor Title Ins. Co.* v. *Brown*, 511 U.S. 117, 121 (1994) (per curiam). In addition, if the case were to go to trial, the uncertain size and scope of the class would certainly affect not only the settlement process, but also the trial process. This Court should make clear that district courts may not certify classes without first satisfying themselves of their jurisdiction over the defined class. This rule merely applies *Steel Company* to the class-certification context.

Finally, the judgment should be vacated because the jurisdictional error infected the course of the litigation, including the trial. As a practical matter, it is clear that litigation and trial strategy are substantially affected not only by class certification, but by the scope of a certified class. Had the plaintiff class been substantially smaller, both settlement and trial tactics would have differed.

Equally to the point, respondents are wrong when they say that dealers' damages would have been the same had the class consisted of ten dealers or ten thousand. The jury expressly found that Exxon was "[r]equired to reduce the wholesale price of motor fuel by an amount that, on average, offset the 3% credit card recovery fee during the Class Period," but was

not required "to reduce the price of motor fuel *to each dealer* by an amount that, on average, offset the 3% credit card recovery fee during the Class Period." Pet. App. 161a. Apparently, the jury found that some dealers were damaged by a higher percentage and some by a lower percentage, necessarily indicating that the certification of a smaller class of large dealers might have altered the damages per dealer. See Pet. Br. 46-48.[6] When this is combined with the unlawful class, it becomes clear that the judgment entered should be vacated.

CONCLUSION

The judgment of the Eleventh Circuit should be reversed.

Respectfully submitted,

CARTER G. PHILLIPS*
VIRGINIA A. SEITZ
ROBERT N. HOCHMAN
SIDLEY AUSTIN BROWN & WOOD LLP
1501 K Street, N.W.
Washington, D.C. 20005
(202) 736-8000

Counsel for Petitioner

* Counsel of Record

February 17, 2005

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[6] In the alternative, respondents urge this Court to treat the class claims as if they asserted an interest in a "common and undivided" right, which, they claim, would permit aggregation of each class member's claims to satisfy the jurisdictional amount. Resp. Br. 49-50. That argument is baseless. This is not a case, like *Shields* v. *Thomas*, 58 U.S. (17 How.) 3 (1854), where each individual plaintiff's right to sue emanated from a common source: the estate of a deceased from which the defendant had wrongfully converted property. Because each plaintiff in *Shields* sued as a representative of that estate, each plaintiff was seeking recovery of a portion of the total amount owed to the estate. The Court therefore determined that aggregation was appropriate. *Id.* at 4-5. Nothing of the sort is at issue here; each plaintiff has sued to recover the amount it alleges it is owed under its own contract. *Troy Bank* v. *G. A. Whitehead & Co.*, 222 U.S. 39, 41 (1911) (aggregation permitted in case by two plaintiffs asserting "single and undivided" right to enforce a common lien on a particular property; had plaintiffs sued only under their separate contracts, and not in their status as lienholders, claims would have been "separate and distinct" and aggregation would not have been permitted).